

Casey's Enterprises, LLC  
d/b/a Casey's General Store #2273  
1502 South Dixon Road  
Kokomo, Indiana 46902

Permit No. DL34-20256

Casey's Enterprises, LLC  
D/b/a Casey's General Store #2339  
3016 South Webster Street  
Kokomo, Indiana 46902

Permit No. DL34-20253

District 2

## **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I.**

#### **BACKGROUND OF THE CASE**

Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #2273, 1502 South Dixon Road, Kokomo, Indiana 46902 (Casey's Dixon) is the applicant for a type 115 Alcohol and Tobacco Commission (ATC) permit, #DL34-20256.<sup>1</sup> On or about February 7, 2003, Casey's Dixon filed its application which was assigned to the Howard County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the application request on April 24, 2003 and on that same date, voted 4 – 0 to deny the application.<sup>2</sup> The ATC adopted the recommendation of the LB on May 5, 2003 and denied the request for the permit.

Permittee Casey's Enterprises, LLC, d/b/a Casey's General Store #2338, 3016 South Webster Street, Kokomo, Indiana 46902, (Casey's Webster) is the applicant for a type 115 ATC Permit, #DL34-20253. On or about February 7, 2003, Casey's Webster filed its application which was assigned to the Marshall County LB for hearing. The LB heard the application request on April 24, 2003, and on that same date, voted 4 – 0 to deny the application.<sup>3</sup>

Casey's Enterprises, LLC filed a timely notice of appeal in each case and the matters were assigned to the ATC Hearing Judge, Mark C. Webb (HJ). The HJ set both matters for hearing on August 21, 2003, and at that time, witnesses were sworn, evidence was heard and the matters were taken under advisement.<sup>4</sup> The permittee was represented by Jerimi J. Ullom, Barnes & Thornburg, Indianapolis. There were no remonstrators of

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<sup>1</sup> Beer and wine (grocery) permit located in an incorporated area.

<sup>2</sup> The LB based its decision on 905 IAC 1-27-4, citing no desire by the community to receive such services at that location. However, this HJ has preliminarily determined based on information from LB member Officer Kevin Akers, that LB member Mike Ridenour had a conflict of interest with respect to these hearings and his vote will not be further considered. Thus for all practical purposes the vote was 3 – 0 to recommend denial of these permits.

<sup>3</sup> The LB rejected the Casey's Webster permit for the same reason that it rejected the Casey's Dixon permit.

<sup>4</sup> Because these appeals contain identical issues of fact and law, they have been consolidated for purposes of appeal. The term "permittee" when used throughout these findings refers to both stores.

record in either matter.<sup>5</sup> The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law with respect to each application to the ATC for consideration.

## II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the LB in favor of the application for each of the Casey's in this cause:

1. Jerimi Ullom, counsel for Casey's.<sup>6</sup> Casey's is a chain of stores and each one is identical with respect to layout and inventory to all others. Casey's holds other grocery permits in Indiana and has had no violations with regard to sales to minors. Casey's has extensive protections and procedures in place to minimize or eliminate the risk of sales of alcohol to minors. Neither permit premises is within 200 feet of a school or church, and in fact, there are several alcohol outlets closer to Kokomo High School than either of the Casey's is located. The remonstrators have not presented any evidence to show that granting Casey's a permit will result in more minors being able to purchase alcohol from them.
2. Jeff Gerling, District Manager, Casey's Enterprises. He testified that Casey's takes care in the people it hires and trains them often during their employment. They participate in the "We Card" program and devote significant effort into not selling alcohol to underaged persons. Casey's carries milk and other dairy products, soups and other canned foods, fruits and vegetables, meats, bread, eggs, juice, water, deli sandwiches and bakery items. Casey's has numerous outlets in Indiana that sell warm beer and wine, and stores identical to this one have been approved as grocery stores.<sup>7</sup>

B. The following individuals testified before the LB in favor of the remonstrators and against Casey's in this cause:

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<sup>5</sup> Kyle Rayl appeared as a remonstrator at the ATC hearing. However, it was disclosed on cross-examination that he is the owner of a package liquor store in Kokomo, is a would-be competitor of Casey's. According to *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*, he has no standing before this Commission. *But see, also, Indiana Association of Beverage Retailers, et.al., v. Indiana Alcohol & Tobacco Commission, et.al.*, No. 49A02-0307-CV-634 (May 25, 2004), stating that a competing permittee has standing before the Commission to contest the awarding of a permit to a competitor. The Commission views *Wine and Spirits* and *IABR* as being in conflict and elects to follow *Wine and Spirits* pending the Indiana Supreme Court's decision on the State's petition for transfer. Thus, because the only remonstrator at this hearing had no standing, from the Commission's perspective, there were no remonstrators of record.

<sup>6</sup> Although Mr. Ullom is the attorney representing the permittee in this action, he presented the bulk of the permittee's presentation before the LB. Therefore, this HJ will characterize his comments as testimony where the context so warrants.

<sup>7</sup> Casey's status as a grocery store pursuant to IC 7.1-3-5-2 and IC 7.1-3-1-19 has not been challenged. Therefore, this HJ will assume for purposes of these proceedings that the permit premises qualifies as a grocery store pursuant to the above statutes.

1. Don Ridenour, Executive Director of Family Service Association.<sup>8</sup> The organization provides a range of social services, including diagnostic and case management for substance abuse matters. He opposes the permit applications based on issues of availability and lack of ability to control consumers within the stores. He indicated that they were concerned that alcohol would be easy to steal from these locations and cited problems with binge drinking and drug use among young people. He further stated that both prospective locations are on major thoroughfares easily accessible to Kokomo High School.
2. Greg Stephens, Howard County resident and business owner. He opposes these permit requests for several reasons. First, he believes they allow easier access to beer.<sup>9</sup> Second, he is concerned because 18 year olds may work at grocery stores and ring up beer and he does not think an 18 year old is mature enough to card everyone who appears to be under a certain age for purposes of purchasing beer. Third, He feels that allowing Casey's to have a permit will result in alcohol sales on every street, which will in turn increase the risks of accidents and cause his insurance rates to go up.<sup>10</sup>
3. Brenda Branson, resident within close proximity of one of the stores under consideration here.<sup>11</sup> She picks up garbage around her house and neighborhood and if Casey's gets a permit, she fears she will have to pick up more. She would like to take away all existing convenience/grocery store permits which have already been granted in Howard County. Additionally, she cited Sen. Brandt Hersmann's survey regarding the sale of beer and wine in convenience stores and gas stations, and 454 out of 581, or 78% voted "no".

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<sup>8</sup> This HJ is informed by LB Officer Akers that Mr. Ridenour is the brother of LB member Mike Ridenour. This fact was never disclosed on the record and constitutes a conflict of interest on behalf of Mike Ridenour. It is absolutely improper for LB members to vote in a matter in which they have a conflict of interest. While it is impossible to name all instances where there will be a conflict of interest, clearly, when one has a financial interest in the outcome or when one's relative is advocating a position before the LB, a member so affected may not participate in that hearing. While it may have had no bearing whatsoever on Mike Ridenour's vote not to grant these permits, there is a clear appearance of impropriety with respect to Mike Ridenour's voting on these petitions and he should have recused himself from hearing them and abstained from voting.

<sup>9</sup> This HJ notes that this argument, applicable to grocery stores, has been rejected by the Indiana General Assembly. *See*, IC 7.1-3-5-2(a). Moreover, individuals who purchase beer must, irrespective of the place of purchase, be at least 21 years of age.

<sup>10</sup> This "opening the floodgates" argument has nothing to do with qualifications for a permit and is not a valid reason for recommending a denial. First, whether Casey's gets a grocery permit is irrelevant to whether any other convenience store or gas station qualifies as a grocery store. Second, even if such a gas station or convenience store qualified as a grocery store, there are only 31 grocery permits allotted on quota for Kokomo. 21 of those have already been awarded, (not counting the two pending in this appeal) and this includes the "big box" stores. Thus, there are only 8 remaining grocery permits in Kokomo to be awarded. Given the size of Kokomo, permits on every corner as decried by the remonstrators is impossible. Therefore, there could only be one additional grocery store outlet. This HJ does not see two grocery permits in Argos as the dire emergency as decried by the remonstrators. Third, Mr. Stephens presented no evidence whatsoever to connect up his concerns with Casey's permits and an increase in his insurance rates. These are nothing more than conclusory statements unsupported by any facts in the record.

<sup>11</sup> The record does not reflect how close Ms. Branson lives to one of the stores at issue and which one it is.

4. Kyle Rayl, owner of Soupley's Wine and Spirits. He opposed the permit requests on competition reasons, citing its harm to the package liquor industry.<sup>12</sup> He felt that Casey's was not a "grocery store" within the meaning of Indiana law.<sup>13</sup> Even if he were not in the package liquor store business, he would oppose any beer/wine outlets because he does not feel it is good public policy to allow for alcohol sales where minors are allowed on the premises.

C. The following exhibits were introduced before the LB in favor of the permittee:  
None.

D. The following exhibits were introduced before the LB in favor of the remonstrators and against the permittee:

1. Map showing the proximity to Kokomo High School of each of the proposed permit premises.
2. Charts (2) showing incidents of alcohol use in various settings.<sup>14</sup>

### III. EVIDENCE BEFORE THE ATC

A. The following individuals testified before the ATC in favor of the permittee in this cause:

1. Jeff Gerling, District Manager. He testified that he visits the two proposed permit premises at least once or twice per month. Each of these Casey's sells milk and other dairy products, soups and other canned goods, fresh fruits, bread and other bakery items, eggs, cereal, juice, sodas, snacks, health and beauty products, paper goods products, pet food and other items. In addition, Casey's makes its own pizza and deli sandwiches in each store. The sale of these goods constitute a substantial portion of the income at each store. Casey's has ten (10) other stores in Indiana which sell alcoholic beverages, none of which have been cited for sales to minors. Casey's devotes great effort into seeing that it does not sell alcoholic beverages to underaged persons. It has an extensive training program which

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<sup>12</sup> Mr. Rayl is a competitor of Casey's and has no standing in these proceedings. *See, fn. \_\_, supra*. Even if he were to be accorded standing, he clearly has a bias in favor of minimizing competition to the package liquor store industry. *See, Standifer v. State*, (1999), Ind., 718 N.E.2d 1107, 1110 "A witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him or affect the weight of [the] testimony" (quoting *Pfefferkorn v. State*, (1980), Ind.App., 413 N.E.2d 1088, 1089. Thus his testimony would not be considered compelling given his economic motivation for opposing this permit. Competition between permittees is not a valid reason for denying a permit.

<sup>13</sup> This HJ would note that the Commission has already determined identical Casey's stores in Indiana to be grocery stores within the meaning of IC 7.1-3-5-2(a). *See*, DL04-19422 (Benton County); DL11-20260 (Clay County); DL91-19209 (White County). Mr. Rayl also proposed several methods of defining a grocery store, none of which comport with current law.

<sup>14</sup> For reasons unknown to this HJ, none of these exhibits are in the record of proceedings transmitted from the LB to the Commission.

requires new employees to undergo training and, after the passage of 90 days of employment, retake the training class, all followed by annual training in this area. The manager of each store with a permit is charged with seeing that all employees are trained in the “We Card” program. Participation in the program is mandatory as a condition of employment. None of the Casey’s stores have seating areas inside the store and thus loitering is not a problem. Beer is only sold by the case, making it difficult to steal beer from the premises.

- B. The following exhibits were introduced before the ATC in favor of the permittee in this cause:
  - 1. Permittee’s policy used by all Casey’s stores to protect against the sale of alcohol to minors.
- C. The following individuals testified before the ATC in favor of the remonstrators and against the permittee in this cause: None.<sup>15</sup>
- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the permittee in this cause: None.

#### IV. FINDINGS OF FACT

- 1. The Permittees, Casey’s Enterprises, LLC, d/b/a Casey’s General Store #2273, 1502 South Dixon Road, Kokomo, Indiana 46902 (Casey’s Dixon) and Casey’s Enterprises, LLC, d/b/a Casey’s General Store #2339, 3016 South Webster Street, Kokomo, Indiana 46902 (Casey’s Webster) are applicants for a type 115 Alcohol and Tobacco Commission (ATC) permit, #DL34-20256 and #DL34-20253, respectively. (ATC File).
- 2. Each store sells milk and other dairy products, soups and other canned goods, fresh fruits, bread and other bakery items, eggs, cereal, juice, sodas, snacks, health and beauty products, paper goods products, pet food and other items. (LB Hearing; ATC Hearing).
- 3. The sales from these items are substantial with respect to each store. (LB Hearing; ATC Hearing).
- 4. There exists in Kokomo a total of 31 Type 115 grocery permits, 21 of which have been awarded. (ATC Records; ATC Hearing).
- 5. Several of the Type 115 grocery permits have been awarded to businesses similar to Casey’s, are located in close proximity to the each of the Casey’s at issue here, and are direct competitors of Casey’s. (LB Hearing; ATC Hearing).
- 6. The Commission has determined numerous other Casey’s General Stores identical to the instant store to be grocery stores pursuant to Indiana law. (ATC Records).

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<sup>15</sup> This HJ would note that Kyle Rayl reiterated his testimony before the LB before it was learned on cross-examination of his status as a competitive remonstrator.

7. Casey's is of good moral character and good repute within the city of Kokomo and throughout Howard County. (LB Hearing; ATC Hearing).
8. No objections made by the remonstrators were directed in any way at the personal conduct of the permittee, Casey's Enterprises, LLC, with respect to either location. (LB Hearing; ATC Hearing).
9. Remonstrators objections before the LB were that alcohol was bad for the community and that they therefore did not want Casey's selling it, and that if Casey's had a permit, that it could result in an increase in underaged drinking. (LB Hearing).<sup>16</sup>
10. Remonstrators presented no testimony that Casey's, if granted a permit, would actually sell alcohol to underaged persons. (LB Hearing; ATC Hearing).<sup>17</sup>
11. Remonstrators submitted no evidence regarding the detriment which they claim would result if Casey's were granted a permit in either case. (LB Hearing; ATC Hearing).
12. Casey's employees are extensively trained to avoid problems regarding the sale of alcoholic beverages to underaged persons, being trained twice within 90 days of being hired, and again, as mandatory annual training. (LB Hearing; ATC Hearing).
13. Remonstrators introduced no facts in support of any inference that the either location in and of itself, was problematic *vsv.* the sale of alcohol.<sup>18</sup> (LB Hearing; ATC Hearing).
14. Competition between Casey's and an existing package liquor store played a role in the remonstrance in this case. (LB Hearing; ATC Hearing).
15. The permits at issue are being placed in commercial locations and are not being placed in residential areas. (ATC Hearing).
16. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

## V. CONCLUSIONS OF LAW

1. The permittees, Casey's Enterprises, LLC, d/b/a Casey's General Store #2273, 1502 South Dixon Road, Kokomo, Indiana 46902 (Casey's Dixon) and Casey's Enterprises, LLC, d/b/a Casey's General Store #2339, 3016 South Webster Street, Kokomo, Indiana 46902 (Casey's Webster) are applicants for a type 115 Alcohol and Tobacco Commission (ATC) permit, #DL34-20256 and #DL34-20253, respectively. (ATC File).

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<sup>16</sup> These arguments would apply to the issuance of any permit, irrespective of type or location.

<sup>17</sup> Whether Casey's would sell alcohol to underaged persons goes to the issue of character. *See*, IC 7.1-3-4-2(a)(2)(A). Additionally, requiring remonstrators to actually prove that a permittee would sell alcohol to underaged persons if given a permit would be a showing difficult or impossible to meet. Regardless, remonstrators have not challenged the notion that Casey's is of good moral character in the community in which it does business.

<sup>18</sup> Although the remonstrators claimed that the proximity to Kokomo High School was problematic, it was conceded that there were similar outlets closer to the high school than either of the Casey's where alcohol was available.

2. Permittee is of good moral character and in good repute in each community in which it does business and is qualified to hold the permits it seeks. IC 7.1-3-4-2(a)(2)(A).
3. Permittee is a grocery store and thus qualified to hold a grocery permit. IC 7.1-3-5-2.
4. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.<sup>19</sup>
5. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).<sup>20</sup>
6. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
7. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
8. Where permittee shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
9. Where a permittee shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*
10. When remonstrators cite to the evils of alcohol in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).<sup>21</sup>
11. LBs should not deny a permit to an otherwise qualified permittee based solely on evidence submitted by a competing permittee. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*.
12. Reasonable competition between permittees which results in better products being delivered, better services being offered, diverse shopping environments and lower prices to consumers is good public policy, helps protect and promote economic welfare, and is not inconsistent with the Commission’s purpose of, *inter alia*, regulating and limiting the manufacture, sale, possession and use of alcoholic beverages. IC 7.1-1-1.
13. A LB’s recommendation is clearly erroneous as long as there is a lack of substantial evidence which supports it. IC 7.1-3-19-11.
14. The Commission may decline to follow the recommendation of the LB where the recommendation of the LB is not based on substantial evidence. *Id.*

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<sup>19</sup> That is not to say that an equal showing must be made with respect to each component. There may be instances where the need is greater than the desire; (e.g., where there are few outlets in the area) or where the desire is greater than the need; (e.g., an applicant who wishes to place an available permit in an otherwise competitive area).

<sup>20</sup> Where the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, or that whether or not need exists, there is simply no desire for the product. *See, John Malone Enterprises, Inc., v. Schaeffer, et.al.*, (1996), Ind.App., 674 N.E.2d 599, where the Court of Appeals upheld the denial of a package liquor store permit in Shipshewana, LaGrange County, where the overwhelming majority of the population were of Amish or Mennonite faith, each which required abstention from alcohol, and because of the unique character of Shipshewana, there were no alcohol outlets anywhere in the community. That case is instructive in that the Court of Appeals recognized a small community’s right to restrict the availability of alcohol within its jurisdiction.

<sup>21</sup> Though this is a close case, the remonstrators would have a more compelling argument if they had shown clearly the causal relationship between the negative impact on the community and the permittee here.

15. The Commission may reverse the LB's action in denying the application of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*
16. The LB's action in denying the application of the permits in these matters was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to deny the applications in these matters was not based on sufficient evidence and cannot be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Permittee, Casey's Enterprises, LLC, in both matters, and against the recommendation of the LB. The appeal of Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #2273, 1502 South Dixon Road, Kokomo, Indiana 46902 (Casey's Dixon) and Casey's Enterprises, LLC, d/b/a Casey's General Store #2339, 3016 South Webster Street, Kokomo, Indiana 46902 (Casey's Webster) are applicants for a type 115 Alcohol and Tobacco Commission (ATC) permit, #DL34-20256 and #DL34-20253, respectively, is granted and the recommendation of the LB in this matter is reversed and the permits applied for herein are hereby GRANTED.

DATED: February 14, 2005

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U-JUNG CHOE, Hearing Judge